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No. 91-453

IN THE
United States Supreme Court
October Term, 1991

David H. Lucas,

Petitioner,

v.

South Carolina Coastal Council,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF OF *AMICUS CURIAE* THE NEMOURS FOUNDATION, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3, The Nemours Foundation, Inc., files this brief as Amicus Curiae in support of Petitioner. Letters of consent from counsel for the parties have been filed with the Clerk.

The Nemours Foundation, a hospital foundation, is the major beneficiary of the Alfred I. duPont Testamentary Trust and the estate of Mr. duPont's business associate and brother-in-law, Edward Ball. In their wills, Mr. duPont and Mr. Ball sought to provide perpetual medical care for sick and handicapped children and the impoverished elderly. To carry out their wishes, the Foundation operates three major health care facilities:

- **The Alfred I. duPont Institute** - a multi-specialty children's hospital in Wilmington, Delaware.

- **The Nemours Children's Clinic** - an outpatient pediatric subspecialty care center in Jacksonville, Florida.

- **The Nemours Health Clinic** - an outpatient center, also located in Wilmington, for the elderly in Delaware.

The statistics contained in the 1990 Annual Report of the Foundation underscore the tens of thousands of American children and elderly who benefit from the work of these facilities. During 1990, the medical staff at the Alfred I. duPont Institute performed 4,392 surgical procedures on sick and handicapped children in the course of managing 2,697 inpatients and over 48,000 clinic and outpatient visits. Their colleagues at The Nemours Children's Clinic had more than 63,000 clinic and outpatient visits. Finally, the elderly made in excess of 62,000 visits to the health care providers working through The Nemours Health Clinic, including 11,396 dental visits, 4,544 audiology visits, and 10,938 eye visits, and received more than 100,000 pharmacy prescriptions.

The medical professionals affiliated with the Foundation's three health-care facilities also engage in extensive medical research activities and have been responsible for numerous treatment innovations. One of these is the rural health care program established by The Nemours Children's Clinic. It involves the coordination of several "satellite clinics" with the Clinic's main facility in Jacksonville to bring primary pediatric care to children in remote areas throughout the State of Florida who might otherwise not have access to a pediatrician.

As the major source of funding for The Nemours Foundation, the Alfred I. duPont Testamentary Trust is one of the largest concentrations of assets in America designated primarily for health care. The Trust's chief asset is its controlling interest in the St. Joe Paper Company.

Operating primarily in the State of Florida, the St. Joe Paper Company and its subsidiaries (the Company) are engaged in five principal lines of business:

- **Forest Products** - the integrated production of corrugated containers, including the cultivation and harvesting of pulpwood and the manufacture of linerboard;

- **Transportation** - the operation of two railroads within the State of Florida;

- **Real Estate** - the ownership, management, and development of real estate;

- **Sugar** - the production of raw sugar, including the cultivation, harvesting, and processing of sugar cane; and

- **Communications** - the provision of telephone services and telecommunications equipment.

The Company owns approximately 1.1 million acres of real property in the State of Florida, or approximately 3% of the land area of the State. Most of this land was purchased in the 1920's and 1930's to provide funding for the Trust and its beneficiary, The Nemours Foundation. The Company is the largest private landowner in Florida. It owns very large tracts in some areas, including 225,289 acres or 63% of Gulf County, Florida, and 197,099 acres or 41% of Bay County, Florida.

A substantial portion of the Company's real property is raw land encompassing wetlands and coastal areas. For example, the Company owns approximately 185 miles of frontage along rivers, bays, major lakes, and ocean beaches in Florida, including almost 65 miles of nearly contiguous bay shoreline. The use of portions of its property has been regulated increasingly in recent years because of possible or perceived impact upon wetlands, coastal areas, and the natural habitats of various wildlife species.

Thus, because earnings from the Company ultimately sustain its medical programs for children and the elderly, The Nemours Foundation is directly and significantly affected by the extensive and evolving local, state, and Federal regulation of the Company's use of its land. Even prohibitions on using small discrete segments of larger parcels can have a substantial cumulative effect on the earnings of the Company and

therefore the funding of the Foundation's medical programs. This is especially true in light of the continuing escalation of health care costs in the United States.

The Nemours Foundation's situation forcefully illustrates the sweeping impact of land use and environmental regulation. It reveals the surprising identity of those who could be forced to bear the burden of that regulation. It is not always large corporate or wealthy landowners. Indeed, it may be the sick and handicapped children and the impoverished elderly who, in this instance, are the Foundation's beneficiaries.

The Nemours Foundation is concerned that, if allowed to stand, the South Carolina Supreme Court's decision will exacerbate the problems of landowners. The Foundation is already confronted by restrictive land use and environmental statutes and regulations in Florida.

REGULATORY POLICIES IN FLORIDA

Florida landowners are subject to a variety of local, state, and Federal land use restrictions.[1] Under Florida's Local Government Comprehensive Planning and Land Development Regulation Act, Fla. Stat. Ann. §§ 163.3161-3243 (Harrison 1989), municipalities and counties are required, individually or jointly, to develop comprehensive land use plans covering residential, commercial, industrial,

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[1] The growth of regulatory restrictions is traced in pertinent cases. *See generally Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981); *McNulty v. Town of Indialantic*, 727 F. Supp. 604 (M.D. Fla. 1989).

agricultural, recreational, conservation, transportation, and other public uses. The provisions of the Act are deemed to be the *minimum* requirements. *Id.* § 163.3161. The comprehensive plans must also address water, soil, coastal (including beach access), historical, scenic and wildlife conservation issues. *Id.* § 163.3177. While intended to advance public policy, a comprehensive plan mandating public housing or open space where the landowner envisioned a commercial development impinges on the landowner's ability to obtain any economic return from the land. From a practical standpoint, landowners may have to comply with varying requirements in each municipality or county in which they own land. Landowners are also affected by concurrency requirements that bar development unless and until adequate supporting infrastructure is in place. *Id.* § 163.317(10)(h). If the local infrastructure is inadequate, the landowner must either wait until it has been upgraded or provide all of the improvements at its own expense.

Florida Administrative Code Rule 9J-5 makes it difficult for landowners to make long-range plans. Fla. Admin. Code Ann. r. 9J-5 (1990). The Rule permits amendment of the comprehensive plan twice during any calendar year. Thus, the landowner faces a moving target against which he must develop long-range options. The Rule specifically calls for policies to protect "native vegetative communities" and endangered and threatened wildlife. As will be discussed below, such requirements can render land commercially useless.

Even if a Florida landowner can leap the local comprehensive plan hurdle, he may also be subject to additional requirements if his proposed development has a "substantial impact" upon more than one county. Fla. Stat.

Ann. § 380.06 (Harrison 1987 & Supp. 1989 & 1990). In addition to satisfying other requirements, landowners may be required to contribute land or build public facilities in order to win approval of a development plan. Fla. Admin. Code Ann. r. 9J-2 (1990). Approval of development may be denied if the authorities find that it would significantly impact endangered, threatened, and special concern plants and animals, beaches, dunes, etc. *Id.* r. 9J-2.0185(3)(c).

Construction in coastal areas is subject to even greater restrictions. Florida Statutes Chapter 161.053 directs the Florida Department of Natural Resources to establish restrictive coastal construction control lines in each county according to the portion of the beach-dune system subject to severe fluctuations, based on a 100-year established storm surge line. Approval of construction seaward of the control line is conditioned upon a number of factors, including the potential impact of the construction on the beach-dune system, protection of sea turtles, salt-resistant vegetation, and endangered plant communities. The developer may be required to provide alternate access. The statute also prohibits construction seaward of the seasonal 30 year high-water line.

By way of comparison, South Carolina's Beachfront Management Act, S.C. Code Ann. §§ 48-39-10 to 48-39-360 (Law. Co-op. 1987 & Supp. 1990), established a baseline and a setback based upon predicted erosion over forty years. *Id.* § 48-39-280. That Act limits construction or reconstruction seaward of the baseline to narrow walkways, small wooden decks, etc. Construction, reconstruction, or alteration of structures between the baseline and the setback is restricted. *Id.* § 48-39-290.

Permitting of activities in wetlands is governed separately by Florida Statutes Chapter 403.91. Before granting a permit, the authorities will, among other things, consider the impact of the proposed activity on fish, wildlife, and their habitats. *Id.* § 403.918. Where wetlands are protected, the State has encouraged municipalities and counties to include buffer zones in their comprehensive land use plans. The Company has experienced demands of buffers of approximately seventy-five feet around wetland and coastal areas.

Landowners face costly disruption when their development plans do not conform with local or regional plans or when they are required to contribute land or facilities. Habitat preservation is potentially an even greater problem. The Company has already been required to preserve habitat for eight species of plants and animals.

Frequently, the rules and regulations regarding activities permitted or prohibited in certain habitats, such as wetlands, or areas where endangered or threatened wildlife exist, are not exact. For example, the Federal Endangered Species Act, 16 U.S.C.A. §§ 1531-1544 (West 1985), protects species which are in danger of extinction. Federal agencies may develop guidelines regarding development or use of critical habitats or areas where endangered species are found, but oftentimes decisions are made on a case-by-case basis. Where use is not banned outright, permits must be obtained, a difficult or frequently impossible task.[2] If permits are issued, use or development of the land is often restricted, or

[2] *See, e.g., Ciampitti v. United States*, 22 Cl. Ct. 310 (1991); *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986).

a portion of the land is set aside, as a condition of obtaining the necessary approvals.

Proposed Florida regulations would mandate stringent onsite and/or offsite preservation and, in some cases buffers, for a variety of animals and plants. For example, the pending Upland Vegetation and Wildlife Policy rule would require 100% onsite habitat preservation for an endangered species; 30% onsite, and 60% offsite preservation for certain threatened animals and preservation of nests along with a 500-foot buffer and forage area for certain threatened birds.[3] An analysis of the draft rule suggests that, if adopted, the regulation could affect one million acres of developable land.

Another prime example is the draft Gopher Tortoise Incidental Take Rule,[4] which would require an "incidental take permit" before land could be subdivided or developed if there were as few as ten gopher tortoise burrows located on five acres of land in South Florida or 20 acres in North Florida.[5] The landowner would have to provide a 50-foot buffer (0.18 acre) for each burrow. If the tract was too small to exercise the onsite protection option, the landowner would have to provide 1.25 times as much protected space offsite. If the landowner could provide onsite protection but elected not to, he would have to provide twice as much protected space *offsite*. Thus, an owner of a five acre site could be required to purchase as much as 3.6 acres offsite for every 10

[3] Proposed as Rule 9J-2.0258 of the Florida Administrative Code.

[4] Proposed as Rule 39-27.013 of the Florida Administrative Code.

[5] There is a presumption that five maintained gopher tortoise burrows exist on each acre. The burden is on the owner to rebut that presumption by conducting a survey of his property.

burrows and set it aside for gopher tortoise burrows. *However*, in an obvious attempt to avoid compensating the owners, the regulation limits the percentage of the property which can be required for tortoise protection: 30% or 50% depending upon the location of the property within the State.

Even if such rules are not finally adopted, they often serve as guides for local comprehensive plans and are implemented, *de facto*. Onsite preservation and buffers can render large parcels of land virtually useless. The cost of offsite preservation can easily strip potential land use of any profit.

SUMMARY OF ARGUMENT

The decision in Lucas is erroneous and in conflict with prior opinions of the Court. The Nemours Foundation urges the Court to indicate in its decision that the discrete, affected segment of a parcel of property or property right should be the focus of a takings analysis.

ARGUMENT

A. There Was An Unconstitutional Taking Of The Lucas' Property.

The Nemours Foundation urges the court to reverse the decision of the Supreme Court of South Carolina on the ground that the South Carolina Beachfront Management Act and its implementation resulted in a taking without just compensation, in violation of the Fifth and Fourteenth amendments. That court's misreading of the opinion in

Keystone v. DeBenedictus, 480 U.S. 470 (1987), cannot be permitted to stand if the Takings Clause is to continue to have any vitality. While The Nemours Foundation disagrees with the conclusion reach by the majority in *Keystone*, it is suggested that the tortured interpretation adopted in *Lucas* below was never intended by the Court.

The majority opinion in *Lucas* adopts a simplistic or "straightforward" approach. Because Lucas did not attack the Beachfront Management Act, the court concluded that it could not engage in the careful analysis of the statute required by the previous decisions of this Court. It thus failed to distinguish between prevention of a nuisance and advancing a legitimate state interest. Nemours submits that the analysis of the dissent in *Lucas* is correct in concluding that the building of a residence does not constitute a nuisance. Further, even had such activity involved a nuisance, the *Lucas* court was required to determine whether the owner was denied economically viable use of his land. Had the court carefully considered either of these questions, it would have been compelled to affirm the condemnation award to Lucas.

B. The Takings Analysis Should Be Limited To The Property Actually Affected.

In addition to supporting Mr. Lucas' effort to obtain a reversal of the South Carolina Supreme Court decision, The Nemours Foundation entreats the court to weigh carefully the impact of its ruling on factual patterns beyond the issue as framed. Specifically, the facts in this case are confined to total economic loss of an entire parcel of land. The circumstances of The Nemours Foundation, as outlined above, illustrate the sheer impossibility in many cases of ever

demonstrating total loss of an entire parcel of land. The growing body of land use regulation in Florida has resulted in an almost imperceptible regulatory taking through inverse condemnation of much of the property upon which the Foundation's income depends. If the Court leaves the impression that lower courts may reject the notion of a taking where less, even substantially less, than the total value of an entire parcel of property (or landholdings in an area) is lost, The Nemours Foundation and its beneficiaries will be deprived of a remedy for each such taking.

The Nemours Foundation's concern is raised by comments of the Court in several recent cases, although the holdings arguably do not rest on those comments. For example, in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978), the Court stated

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole--here, the city tax block designated as the "landmark site."

Id. at 130-131. However, this position is neither substantiated by reference to earlier decisions,[6] nor is it consistent with the Court's analysis in that case. The Court in that instance was most explicit in comparing the lost air rights (the discrete, affected segment) to the value of transferable development rights.

The majority in *Keystone* was confronted with a facial challenge to a Pennsylvania statute[7] and refused to find constitutional infirmity on the basis of the record. Nevertheless, it took great pains to explain that less than 2% of the coal reserves of the owners would be affected by the Pennsylvania law.[8] An even greater conflict with the *Penn Central* position is adopted by its author in the dissent in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In the latter case, the dissenters complain that what is "taken" amounts to a fraction of a cubic foot. Thus, discrete segments of the property at issue *are* considered by the Court, but often, seemingly, for the purpose of justifying its conclusion.

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[6] This untempered language appears for the first time in *Penn Central*, and despite its lack of support in prior cases, it is now cited and relied upon regularly by lower courts. *See McNulty v. Town of Indalantic*, 727 F. Supp. 604 (M.D. Fla 1989); *Deltona, Inc. v. U.S.* 657 F.2d 1184, 228 Ct.Cl. 476 (Ct.Cl. 1981).

[7] The Bituminous Mine Subsidence and Land Conservation Act, Pa. Stat. Ann. tit. 52, § 1406.1-1406.21 (Purdon Supp. 1991).

[8] The majority cites Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967), when comparing the coal lost by petitioners with their total reserves. However, it is doubtful that the Michelman article supports the Court's conclusion.

The Foundation is encouraged by the *Keystone* minority's acknowledgment that despite the relative size of the lost coal, it comprised 27 million tons for which the owners should have been compensated. While the minority's approach has also been followed by lower courts, there is obviously great confusion in this area. Two cases are most compelling.

In *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988), the court held that the taking analysis should be applied to a 12.5 acre wetland portion of an original tract of 250 acres of which 51 acres had not been developed. The court refused to expand the definition of the affected property to either the full 250 acre parcel as originally purchased or to the remaining undeveloped 51 acres. Thus, the court ruled that the degree of impact and the type of governmental action questions were to be answered solely with respect to the wetlands portion on which development was denied.

In contrast, three years later the same court adopted a contrary position without any attempt to explain the inconsistency. *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991). Relying on the above-quoted language in *Penn Central*, the court elected to focus on the "parcel as a whole." *Ciampitti*, 22 Cl. Ct. at 318. The reasoning of the court is enlightening, however, because it demonstrates the confusion between identifying the property and determining the degree of loss suffered by the owner. While it was admittedly attempting to define the affected property, the court wandered into the "bundle of rights" analysis which should only be performed after the property has been identified. *Id.*

The similarity between the facts in *Loveladies Harbor* and *Ciampitti* and the inexplicable and unexplained[9] contradiction in their analyses[10] can perhaps be rationalized by reference to the second ground for the *Ciampitti* result. The court was clearly convinced that the property owner, in the aggregate, had succeeded rather well in achieving reasonable investment expectations. It is suggested, however, that such reasoning does violence to the concept of uncompensated taking and substitutes the judiciary's opinion for that of the private investor.

The Nemours Foundation suggests that while not directly at issue here, the Court should not overlook this important aspect of a most complicated subject - the definition of the property at which the governmental action is directed. The Foundation further proposes that the Court obviate the possibility that the lower courts in future taking disputes might focus on property which is not affected but in some way related to that which has been affected. Stated otherwise, and contrary to the language from *Penn Central* quoted above, the Foundation urges the court to indicate that affected, discrete segments of a property or a property right be the focus of inquiry and that the taking rubric be applied to those specific segments.

The Nemours Foundation does not contend here that less than a total loss of value is compensable. That is an issue which must be addressed on a case by case basis and

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[9] In *Ciampitti*, the court makes no reference to *Loveladies*.

[10] The court in *Ciampitti* acknowledges that the affected parcel and another which were combined as the focus of the taking analysis were not even contiguous. *Id. at 320.*

the Florida courts have adopted a responsible approach toward that aspect of the problem. *See Joint Ventures, Inc. v. Dept. of Transportation*, 563 So.2d 622 (Fla. 1990). The Nemours Foundation suggests, however, that the analysis of the degree of loss be postponed until the affected property or property right has been isolated. At that point, a court can consider the degree of loss and the justification therefor. The regulatory framework in Florida[11] lends itself to gradual imposition of a wide variety of use restrictions which have differing impacts upon property and property rights. The constitutionality of the statutes and the regulations issued thereunder will be tested over time. It is likely that these challenges will be confined to particular takings. If the courts are permitted to apply the takings tests to entire parcels of property rather than the affected segment, large landholders, such as those from which The Nemours Foundation derives its income, will regularly lose these challenges.

An example of a small taking is found in the seventy-five foot buffer zones required in coastal, wetland, and waterfront areas. One mile of such buffer totals more than nine acres. This amounts to an almost immeasurable portion of a 200,000 acre tract, but constitutes extremely valuable property. As noted above, over 185 miles of such buffer zones could render numerous segments of property valueless over a period of years.

It is arguable that if challenges are viewed in the context of total land holdings, large landholders might never be compensated where the taking is in small increments dependent upon the whims of wildlife. As exemplified by

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[11] This would include the State as well as Federal land use and wildlife protection statutes and regulations.

proposed Rule 39-27.013 of the Florida Administrative Code, discussed *supra*, the State regulators already anticipate juxtaposing the affected segment (30% or 50% maximum) against the entire parcel, arguing that all economic viability is *not* lost. Thus, it is critical that landholder be able to challenge the taking on the basis of the segment actually affected.

CONCLUSION

While previously perhaps not a major consideration in the overall issue of governmental taking, the definition of the affected property is of paramount importance to The Nemours Foundation. Failure on the part of courts to limit their determinations to that segment of the property actually impacted by the governmental action will severely jeopardize the right to just compensation for those lands owned by those entities supporting The Nemours Foundation and its beneficiaries.

Respectfully submitted,

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